

Canada Watch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

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SPECIAL ISSUE: THE QUEBEC SEPARATION REFERENCE

STÉPHANE DION: BEARER OF THE UNITY TORCH OR ANOTHER CANDLE IN THE WIND?

BY A. WAYNE MACKAY

The line between law and politics has never been a distinct one and it is rarely more blurred than in matters constitutional. This point is clearly illustrated by the recurring issues concerned with the separation of Quebec from Canada. Traditionally, the federal government has fought the battle against Quebec sovereignty in the political rather than the legal arena. There was a sense that to even enter the legal debate would lend a credibility to separation and in some subtle way make the departure of Quebec more likely.

After Canada's near-death experience in the 1995 referendum in Quebec, the federal government decided to reconsider its strategies with respect to Quebec and the thorny issue of separation. The first sign of this new approach came with the appointment of Stéphane Dion as Minister of Intergovernmental Affairs. Mr. Dion brings to this challenging portfolio an enthusiasm, credibility, and academic credentials that have not

been seen since the days of Pierre Elliott Trudeau. While Dion brings a Trudeauesque intellect to the unity debate, he does not carry the same federalist baggage as did Mr. Trudeau. Like Trudeau, Stéphane Dion turned to the Supreme Court of Canada to provide the legal foundation for the federalist edifice.

In 1981, then Prime Minis-

ter Trudeau defended the unilateral federal patriation of the Constitution in the Supreme Court of Canada. While the original legal references arose in the provinces of Manitoba, Newfoundland, and Quebec, the federalists did not shrink from a fight in the Supreme Court of Canada. The Court, speaking through the late Chief Justice Bora Laskin, in its first televised decision, (ironically and, some would say, significantly, the sound system failed for the first part of the broadcast), held that unilateral patriation by the federal government was constitu-

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FOREIGN AFFAIRS, NATIONAL UNITY, AND SOVEREIGNTY

BY DANIEL TURP

Canada has always been a country proud of its foreign affairs record. As a middle power, Canada has played a significant role in the post-1945 period and has earned the reputation of a responsible state actor. Building on the legacy of Nobel Prize winner Lester B. Pearson, Canada has been committed to the peace-keeping efforts of the United Nations and of other international organizations in which it continues to play a key role. The active involvement of Canadian governmental depart-

ments and agencies in the processes of electoral monitoring and democratic development has also given Canada an enviable reputation.

The most recent, and daring, initiative of the minister of Foreign Affairs, M. Lloyd Axworthy, in the area of anti-personnel land mines has also proven the ability of the government of Canada to go beyond peace-keeping and to ensure that measures of peace-building become a priority

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by Paul Joffe

from the strategizing of the Chrétien federalists.

The hard truth is that Canada's unity parties can no longer win elections in Quebec as they once did. Their electoral fortunes peaked over two decades ago. So Ottawa's power brokers increasingly need to conduct politics by other means—the Supreme Court, constitutional conferences, if necessary, such as Meech Lake, Charlottetown and now the Calgary Declaration and, recently, federalist legislation such as the *Regional Veto Act* designed to prevent any kind of fundamental constitutional change from being implemented.


Ramsay Cook, a leading historian of French-Canadian nationalism, wrote almost three decades ago that the only way to halt Quebec's natural evolution out of Canada was to build "a fruitful partnership in a single state".

Behind these initiatives is a mind-set and a vision. The Trudeau generation, still in power, continues to believe its old idea that Ottawa can deliver a definitive knockout blow to Quebec's national aspirations, at least for a generation. This is the genesis of Plan "B" even before it was called Plan "B". It stems from the idea that federalist Canada can strong-arm Quebec to accept an inferior status as one of Canada's provinces. Ottawa is attempting to do this one last time by using the Supreme Court to hear the Reference

Case, but Canada's federalist leadership will fail again. Must this happen? Probably, unless the Trudeau generation loses power or reaches out for a new beginning.

ELITE DISCOURSE

Yet, there is an alternative. It is worth recalling that, long before Bouchard came on the scene with his own ideas of partnership, federalist thought had a much different view of nationalism and politics. Ramsay Cook, a leading historian of French-Canadian nationalism, wrote almost three decades ago that the only way to halt Quebec's natural evolution out of Canada was to build "a fruitful partnership in a single state". If English Canadians could bring Canada's constitutional reality closer to the goal of partnership with Quebec, they could avoid the kind of crises they have witnessed in the recent past.

Three decades on, there is still no solution to establishing a new balance of forces in the country. At the very least, no one should pretend that there is no outline for one. Relying on the Supreme Court will only hasten the inevitable of having to negotiate, in trying circumstances, with a sovereign Quebec. 

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within the international community. Canada's overseas development aid has been generous at times and the Canadian International Development Agency (CIDA) has assured Canada an outstanding reputation in the developing world.

THE BLOC AND FOREIGN AFFAIRS

This good record of Canada has never been challenged by Quebeckers, including those who have promoted and continue to promote sovereignty for Québec. On the contrary, Quebeckers have participated fully in the making of Canadian foreign policy and have played an influential role in the implementation of Canada's foreign aid policy.

The values that underlie the foreign policy of successive Canadian governments (peace, security, human rights, and solidarity) are shared values and it would thus be surprising that there be major conflicts. Hence, during the 35th Parliament, the Bloc Québécois regularly gave the government of Canada its support and participated in a constructive fashion in the debates of the House of Commons and the Standing Committee on Foreign Affairs and International Trade.

There remain areas of disagreement. The Bloc Québécois has insisted that there be a linkage between human rights, trade, and aid and has strongly criticized the Chrétien government for its inconsistent decisions in these matters. The Bloc Québécois has also opposed foreign policy initiatives dealing with education and culture, which are matters of provincial jurisdiction and which have been used by the federal government to justify its increasing involvement in these areas. The Bloc Québécois has also considered the

positions of the federal government on the inclusion of social and cultural exemption clauses in international trade agreements to be contradictory.

[T]he Liberal government and Bloc Opposition might soon be on a collision course if the federal government attempts to use, and abuse, its foreign policy to thwart the democratic drive of Québec towards sovereignty.

The constructive attitude and legitimate opposition of the Bloc Québécois will continue to dictate the policy of the Bloc in these matters. But, the Liberal government and Bloc Opposition might soon be on a collision course if the federal government attempts to use, and abuse, its foreign policy to thwart the democratic drive of Québec towards sovereignty. If the means to promote national unity are seen to be illegitimate by sovereigntists, and the government's Plan B can be qualified as such, the collision might be very direct.

PLAN B AND FOREIGN AFFAIRS

Plan B relies heavily on legal argument and brings into play the Supreme Court of Canada, which is called upon to affirm that Quebeckers have no right to declare sovereignty without Canada's consent. Plan B em-

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phasizes the conditions of secession of Québec and calls into question the democratic rules that have governed the

This Plan B, which I believe will prove to be a fatal strategic error on the part of the federal government and those who favour such a plan, could be echoed in international circles by the foreign service of Canada, diplomats, members of Parliament, and ministers alike. If such were the case, the Bloc Québécois will not hesitate to denounce Plan B in the same international milieu and affirm that such a plan is an unacceptable attempt to hijack the democratic process in Québec. The Bloc Québécois will point out that Québec's own plan for sovereignty has always been democratically driven and that it is inclusive in its outlook.

previous referenda on the future of Quebec. It also appears to support the partition of Quebec along ethnic and lin-

guistic lines.

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The international community will also be told that the Bloc Québécois favours an authentic partnership with Canada and that it thus continues to argue for the preservation of an economic and monetary union following the accession of Québec to statehood.

In any case, the Bloc Québécois will launch an offensive to promote sovereignty on the international scene and to obtain, at the appropriate time, international recognition. Meetings with foreign diplomats and of parliamentary associations have given the Bloc Québécois, its leader and foreign affairs critic as well as other parliamentarians, an audience and will continue to do so. Those forums shall be used extensively in the coming months and will allow the Bloc Québécois to make its case for sovereignty and partnership. The case for Québec's independ-

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details of the separation would be a matter of negotiation with the ROC. Even if Québec could establish the right to unilaterally separate from the ROC, it cannot dictate to the ROC the terms of that separation. This is as true in the political world as it is in the legal one. The ROC will not be a passive observer in the breakup of Canada.

Keeping the country together should always be Plan A, but there is nothing wrong with a Plan B, aimed at an orderly and informed dissolution of the country. Canada should be a nation that operates under the rule of law in bad as well as good times.

Part of the appeal of Minister Dion's strategy is that it attempts to clarify the basic legal ground rules in advance. The heated emotions that would likely follow a vote by Québec to separate from the ROC is hardly the climate in which to make up the rules. To use the worn metaphor of the marriage, Minister Dion is attempting to get a belated prenuptial agreement about what will happen in the event of separation. It is my hope and the hope of many Canadians that Québec will remain as a valued member of Canada. However, I do not see establishing the legal ground rules for separation as detracting from the objectives of Cana-

dian unity. Keeping the country together should always be Plan A, but there is nothing wrong with a Plan B, aimed at an orderly and informed dissolution of the country. Canada should be a nation that operates under the rule of law in bad as well as good times.

One of the attractive aspects of Minister Dion's unity strategy is that he does not put all of his eggs in one basket. While waging the legal battle in the Supreme Court of Canada, he continues to fight in the political arena for the hearts and minds of the Québécois. He has done this most notably in his exchange of letters with Mr. Bernard Landry. Recognizing the close link between law and politics, he uses legal arguments to advance the federalist position and to expose weaknesses in the sovereigntist position. He has also risen above the trenches of personality assassination and reclaimed an intellectual constitutional mantle that was last worn by Pierre Trudeau. Dion's appeal to the mind is a welcome supplement to Prime Minister Chrétien's "from-the-heart patriotism".

The Dion blend of law and politics is all the more appealing when contrasted with the well-intentioned but fluffy political strategy that has been called the "Calgary Accord". By eschewing the constitutional route to changing the federalist structure, the premiers have lost in substance what they have gained in flexibility. Armed with an understanding of both constitutional and international law, Stéphane Dion may emerge as a better champion for Canadian unity than nine premiers and two territorial leaders, clothed only in transparent political rhetoric. Indeed, it

sumed and stated by the five experts. As a result, Charron has misconstrued the scope and implications of the experts' concluding responses.

Effective control is not a harmonious strategy on which to base Quebec's accession to independence. In essence, it would trigger a battle for exclusive authority that is likely to generate huge territorial conflicts, chaos, and very possibly violence. Faced with such an explosive situation, partition may well be the only reasonable compromise if the rights of all parties affected are to be respected.

Both questions posed to the five experts are premised by the ambiguous phrase "assuming that Quebec were to attain sovereignty". The five experts make clear that the date they are using to reply to the posed questions is not (as Charron assumes) the moment when Quebec would unilaterally declare its independence. Rather, the date that Quebec would attain sovereignty would be after effective control is achieved by a seceding Quebec. Quebec, the five experts say, could not be regarded as having achieved independence until it prevented the Canadian authorities from exercising control over its territory. The experts add that the test of this effectiveness is the recognition by third-party

states (and the state from which the territory was severed).


STRUGGLE FOR EFFECTIVE CONTROL

As soon as a unilateral declaration of independence (UDI) were proclaimed by Quebec, a struggle of indeterminate length would begin for effective control of all territory currently included within provincial boundaries. As the five experts emphasize in their study, indigenous peoples have access to the principle of "effective control" on the same terms as Quebec. In other words, there is no guarantee of Quebec retaining its present borders following a UDI.

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[T]he government of Canada publicly declared to the international community on October 31, 1996 that Canada is "legally and morally committed to the observance and protection of this right [of self-determination]" under international law in relation to indigenous and non-indigenous peoples.

The five-expert study is not the last word on the question of territorial division, in the event of a secession attempt in Quebec. The study has been strongly criticized by numerous international jurists, in areas of analysis that might have lent weight to Quebec. Also, since the time that the study was completed, the government of Canada publicly declared to the international community on October 31, 1996 that Canada is "legally and morally committed to the observance and protection of this right [of self-determination]" under international law in relation to indigenous and non-indigenous peoples.


These developments are further indication that careful scrutiny of all relevant legal perspectives is critical. Human rights and democracy must receive full and fair meaning in the Quebec secession debate. In particular, the rights of Aboriginal peoples cannot be cast aside based on questionable political positions by the government in Quebec. 

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ence will be made in a responsible and honest fashion and will not attempt to denigrate Canada. It will emphasize the need to put an end to the impasse which characterizes the relationship between Canada and Québec and to find innovative solutions to bind, albeit in a different fashion, the future of their peoples.

NATIONAL UNITY AND NATIONAL SOVEREIGNTY

National unity of Canada and national sovereignty for Québec are two legitimate goals. The promotion of these goals in the international community is inescapable, and it is in both Canada and Québec's interest that the debate, as it extends in international circles and becomes a foreign affairs issue, remains dignified. It is my hope that both federalists and sovereigntists overcome the temptation to disrespect the beliefs and ideals of their rivals and that they provide the international community with an example of a debate carried on in a civilized fashion. The ideals of friendly relations between peoples and states, cherished by Quebeckers and other Canadians alike, would be better served in this way. It would prove that even in the dramatic and emotional discussion on the future of Canada and Québec, the shared value of democratic expression can prevail. 

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